

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

<b>JANE DOE LAGO VISTA,</b>	§	
<b>JANE DOE FRISCO,</b>	§	
<b>JANE DOE GRAPEVINE</b>	§	
<b>JOHN DOE, HURST EULESS BEDFORD</b>	§	
<b>JANE DOE HURST EULESS BEDFORD</b>	§	
<b>b/n/f , PARENTS OF JANE AND DOE's</b>	§	
<b>and on behalf of other students</b>	§	
<b>similarly situated;</b>	§	
 <b>PROPOSED CLASS, PLAINTIFFS,</b>	§	 <b>CIV. ACTION NO.</b>
 <b>v.</b>	§	
 <b>LAGO VISTA INDEPENDENT</b>	§	 <b>CLASS ACTION COMPLAINT</b>
<b>SCHOOL DISTRICT</b>	§	<b>FOR VIOLATIONS OF</b>
<b>FRISCO INDEPENDENT SCHOOL</b>	§	<b>PLAINTIFFS' CONSTITUTIONAL</b>
<b>DISTRICT,</b>	§	<b>RIGHT TO LIFE</b>
<b>GRAPEVINE- COLLEYVILLE</b>	§	
<b>INDEPENDENT SCHOOL DISTRICT,</b>	§	
<b>HURST EULESS BEDFORD INDEPENDENT</b>	§	
<b>SCHOOL DISTRICT,</b>	§	
 <b>DEFENDANTS.</b>	§	

**ORIGINAL CLASS ACTION COMPLAINT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiffs Jane Doe Lago Vista, Jane Doe Frisco, Jane Doe Grapevine-Colleyville, Jane Doe Hurst-Euless-Bedford and John Doe Hurst-Euless-Bedford by and through their parents as next friends, and on behalf of the "PROPOSED CLASS, (collectively "PLAINTIFFS" herein) in the above noted and styled Class Action Complaint alleging that the Lago Vista Independent School District, Frisco Independent School District, Grapevine-Colleyville School District and the Hurst Euless Bedford Independent School District violated the constitutional

rights of DOE's and the PROPOSED CLASS MEMBERS in the manners and particulars more specifically addressed below. Plaintiffs reserve the right to replead if new claims and issues arise upon further development of the facts, as permitted by law. In support thereof Plaintiffs would respectfully show this tribunal the following:

### **I. PROLOGUE**

1. "No freedom is more precious than life itself..... Texas will always defend the right to life."

#ProLife-The Honorable Governor of Texas, Grefory Abbot

This pronouncement by the Governor, is based upon public policy set forth by the Texas Legislature. The PROPOSED MEMBERS in the CLASS ACTION seeks to assure that Texas Public Policy giving due honor to the preciousness of life, is effectuated in concert by and through the *Due Process Clause* of the 14<sup>th</sup> Amendment to the United State Constitution which states:

Section 1- All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce (*emphasis added*) any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life (*emphasis added*), liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Accordingly the DOE's, PROPOSED MEMBERS in the CLASS ACTION have a cause of action pursuant to 42 U.S.C. Section 1983 and asks the Court to issue a *Temporary Restraining Order* and later a *Permanent Injunction* compelling each Defendant School District to implement a *Mask Mandate*.

### **II. INTRODUCTION**

2. It is well known that our country is in the midst of a plague. Fortunately, a vaccine is available for adults and young people who are 12 years and older but for children under that

current minimum age, there is no vaccine. They are at extreme risk of getting the current strain of COVID-19, now known as the Delta Variant. Unlike its earlier iteration, it is extremely more infections and spreads more easily, effecting people who have not yet been vaccinated disproportionately. The Defendant School Districts do not require its students, teachers, staff or even guests to wear a face mask, the bare amount of protection that is currently the only thing available to safeguard children from the virus itself, putting our youngest and precious ones at significant risk. The Defendant School Districts rely upon an Executive Order from the Governor of Texas that purportedly does not permit a local school boards to have a mask mandate. As more fully discussed below the Governor's order is superceded by the Supremacy Clause noted in the United States Constitution. Moreover the value of life in the Due Process Clause of the 14<sup>th</sup> Amendment to the Constitution supercedes any other purported right a student may have, whether constitutional or statutory, state or federal. Plaintiffs and the members of the proposed class have experienced and continue to experience irreparable harm because Defendant School Districts noted herein does not have mandated mask policy, as will be more fully described below.

### **III. SUPREMACY CLAUSE**

3. The Governor of Texas, the Honorable Greg Abbot issued Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster which among other things, states that a public school district cannot require a student or employee or any person for that matter, as a condition of entry to a public school, to wear a mask. Respectfully, while arguably well-intended, it is nevertheless rendered a nullity by the Supremacy Clause of the Constitution of the United States (Article VI, Clause 2) which states that the Constitution,

federal laws made pursuant to it, and treaties made under its authority, constitute the “Supreme Law of the Land” and thus take priority over any conflicting state laws. It provides that state courts are bound by, and state constitutions subordinate to, the supreme law of the land.

#### **IV. JURISDICTION**

4. Jurisdiction is conferred upon this Court Pursuant to 28 U.S.C.A. §1331 and §1343 because the matters in controversy arise under the Constitution and laws of the United States.
5. Furthermore, this Court has supplemental jurisdiction over various state and common law claims pursuant to 28 U.S.C. §1337.

#### **V. VENUE**

6. Pursuant to 28 U.S.C. §1331 this Court is the proper Venue over this cause, as all events and omissions giving rise to Plaintiffs and members of the PROPOSED CLASS MA claims occurred and may be consolidated in the Western District of Texas, Austin Division as they all reflect common issues of law and fact.

#### **VI. PARTIES**

##### **A. Lago Vista Independent School District**

7. JANE DOE Lago Vista lives with her parents, in the Lago Vista Independent School District catchment area.
8. The Lago Vista Independent School District is a school district organized under the laws of the State of Texas and at all times is required to follow the laws contemplated by the United States Constitution and the federal and state laws and rules promulgated thereunder. District personnel are thus responsible for the care, managements and control of all public school

business within its jurisdiction; including but not limited to the assuring the health and safety of students within the district are paramount. They may be served by and through their Superintendent, the Honorable Darren Webb at 8039 Bar-K Ranch Road, Lago Vista, Texas 78645. Plaintiffs reasonably believe the School District is represented by the Honorable, Sara Leon, Attorney and she will accept service on behalf of Defendant School District.

B. **Frisco Independent School District**

9. JANE DOE FRISCO lives with her parents, in the Frisco Independent School District catchment area.
10. The Frisco Independent School District is a school district organized under the laws of the State of Texas and at all times is required to follow the laws contemplated by the United States Constitution and the federal and state laws and rules promulgated thereunder. District personnel are thus responsible for the care, managements and control of all public school business within its jurisdiction; including but not limited to the assuring the health and safety of students within the district are paramount. They may be served by and through their Superintendent, the Honorable Dr. Mike Waldrip at 5515 Ohio Dr, Frisco, Texas 7585. Plaintiffs' reasonably believe that the Honorable Naomi Harper, General Counsel for Frisco Independent School District will accept service on behalf of Defendant School District.

C. **Grapevine-Colleyville Independent School District**

11. JANE DOE III at GRAPEVINE-COLLEYVILLE ISD lives with her parents, in the Grapevine-Colleyville Independent School District catchment area.
12. JON DOE III at GRAPEVINE-COLLEYVILLE ISD lives with his parents, in the Grapevine-Colleyville Independent School District catchment area.

13. The Grapevine-Colleyville Independent School District is a school district organized under the laws of the State of Texas and at all times is required to follow the laws contemplated by the United States Constitution and the federal and state laws and rules promulgated thereunder. District personnel are thus responsible for the care, managements and control of all public school business within its jurisdiction; including but not limited to the assuring the health and safety of students within the district are paramount. They may be served by and through their Superintendent, the Honorable Dr. Robin Ryan at 3051 Ira E. Woods Avenue, Grapevine Texas 76051.

D. **Hurst-Euless-Bedford Independent School District**

14. JANE DOE IV at HURST EULESS BEDFORD ISD lives with her parents, in the Hurst Euless Bedford Independent School District catchment area.

15. JON DOE IV is a student within HURST EULESS BEDFORD ISD. He lives with his parents in the Hurst Euless Bedford Independent School District catchment area.

16. The Hurst Euless Bedford Independent School District is a school district organized under the laws of the State of Texas and at all times is required to follow the laws contemplated by the United States Constitution and the federal and state laws and rules promulgated thereunder. District personnel are thus responsible for the care, managements and control of all public school business within its jurisdiction; including but not limited to the assuring the health and safety of students within the district are paramount. They may be served by and through their Superintendent, the Honorable Steve Chapman at 1849 Central Dr, Bedford, Texas 76022.

**VII. STANDING**

17. JOHN DOE I, JANE DOE I, etc. and all the DOE's and members of the PROPOSED CLASS In this case have standing to bring this lawsuit because they are their families live in the Defendant Independent School Districts catchment areas. Moreover each individual plaintiff is too young to receive a vaccine and has either gotten ill from the Delta Variant, has been exposed to the Delta Variant, will in the reasonable foreseeable future get ill from the Delta Variant, or be a carrier of the Delta Variant and get another person sick. Moreover, and because of the unknown aspects of this disease, all the above is capable of repetition yet evading review.

**VIII. IMMUNITY**

18. To the extend any Defendant School District wants to claim 11<sup>th</sup> Amendment Sovereign Immunity it may not do so, as it is not eligible for such protections. Moreover, and in any case even if it were, it may not claim the protection of sovereign immunity because the DOE's and members of the PROPOSED CLASS are asking only for equitable relief. Ex Parte Young, 209 U.S. 123 (1908). If the Defendant attacks the DOE's and members of the PROPOSED CLASS attempt to deny Class Certification and it is granted, the DOE's and members of the PROPOSED CLASS reserve the right to amend this petition, seek damages and serve the Board Members and individual staff members in their Individual Capacities.

**IX. RETALIATION**

19. The DOE's and the PROPOSED CLASS, Plaintiffs herein put the Defendants Independent School Board on notice that they plan to seek the safe harbor of School Board Policies and

Procedures protecting the rights of those persons who file complaints, grievances and who otherwise seek to redress their concerns through First Amendment Rights under the United States Constitution. If any Defendant individually or collectively or by proxy attempts to retaliate against any DOE's or member of the PROPOSED CLASS, DOE's and members of the PROPOSED CLASS reserve the right to amend this petition, seek damages for retaliation and serve the Board Members or complicit staff members in their Individual Capacities for such retaliation.

**X. ADMINISTRATIVE EXHAUSTION**

20. The DOE'S, Plaintiffs and members of the PROPOSED CLASS contend there are no claims in this litigation that require Administrative Exhaustion, as may otherwise be required by the *Individuals With Disabilities Education Act* ("IDEA"), 20 U.S.C. §1415(1). Specifically, it is not warranted in this cause because there is an exception to the Administrative Exhaustion requirement when there is a CLASS ACTION; and all students both disabled and not are seeking the same relief, i.e., that the implementation of a *Mask Mandate* and following of all current recommendations for School aged children from the *Center For Disease Control* ("CDC").
21. A Special Education Hearing Officer is appointed to hear claims under the IDEA and does not have the jurisdiction to address class actions or the constitutional claims expressed herein. More specific to JOHN/JANE DOE, and those persons similarly situated, a Special Education Hearing Officer in Texas does not have the authority to order the Defendants Independent School District to follow CDC Guidelines or order all students to wear a mask at school and provide the relief requested as only this Court can. Accordingly,

Administrative Exhaustion is futile. Honig v. Doe, 484 U.S. 305, 327; 108 S. Ct. 592 (1988)

## **XI. THE CURRENT HEALTH CRISIS**

### A. THE INITIAL CONCERNS

22. Corona Virus 2019 (COVID-19)<sup>1</sup> is a contagious disease caused by severe acute respiratory syndrome corona virus 2 (SARS-CoV-2). The first known case was identified in Wuhan, China, in December 2019. The disease has since spread worldwide, leading to an ongoing pandemic. Symptoms of COVID-19 are variable, but often include fever, cough, headache, fatigue, breathing difficulties, and loss of smell and taste. Symptoms may begin one to fourteen days after exposure to the virus. At least a third of people who are infected do not develop noticeable symptoms. Of those people who develop symptoms noticeable enough to be classed as patients, most (81%) develop mild to moderate symptoms (up to mild pneumonia), while 14% develop severe symptoms (dyspnea, hypoxia, or more than 50% lung involvement on imaging) and 5% suffer critical symptoms (respiratory failure, shock, or multi organ dysfunction). Older people are at a higher risk of developing severe symptoms. Some people continue to experience a range of effects (“long COVID”) for months after recovery, and damage to organs has been observed. Multi-year studies are underway to further investigate the long-term effects of the disease.
23. COVID-19 transmits when people breathe in air contaminated by droplets and small airborne particles containing the virus. The risk of breathing these in is highest when people are in close proximity, but they can be inhaled over longer distances, particularly indoors. Transmission can also occur if splashed or sprayed with contaminated fluids in the eyes,

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<sup>1</sup>. <https://en.wikipedia.org/wiki/COVID-19>

nose or mouth, and, rarely, via contaminated surfaces. People remain contagious for up to 20 days, and can spread the virus even if they do not develop symptoms. Several testing methods have been developed to diagnose the disease. Preventive measures include physical or social distancing, quarantining, ventilation of indoor spaces, covering coughs and sneezes, hand washing, and keeping unwashed hands away from the face. The use of face masks or coverings has been recommended in public settings to minimize the risk of transmissions. While work is underway to develop drugs that inhibit the virus (and several vaccines for it have been approved and distributed in various countries, which have since initiated mass vaccination campaigns), the primary treatment is symptomatic. Management involves the treatment of symptoms, supportive care, isolation, and experimental measures.

B. THE COVID-19 PANDEMIC AND CHILDREN PART I

24. A systematic review notes that children<sup>2</sup> with COVID-19 have milder effects and better prognoses than adults. However, children are susceptible to "multisystem inflammatory syndrome in children" (MIS-C), a rare but life-threatening systemic illness involving persistent fever and extreme inflammation following exposure to the SARS-CoV-2 virus. As a vulnerable population, children and youth may be affected by the COVID-19 pandemic in many other domains, including education, mental health, safety, and socioeconomic stability; the infection of the virus may lead to separation or loss of their family. As with many other crises, the COVID-19 pandemic may compound existing vulnerabilities and inequalities experienced by children. When a child is infected with COVID-19, they are more likely to have an asymptomatic case, or one that is mild to moderate in severity. They

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<sup>2</sup>. [https://en.wikipedia.org/wiki/Impact\\_of\\_the\\_COVID-19\\_pandemic\\_on\\_children](https://en.wikipedia.org/wiki/Impact_of_the_COVID-19_pandemic_on_children).

are less likely to become infected or hospitalized than adults. Nevertheless, severe illness is possible, and in these instances respiratory support, such as a ventilator, may be required. Some children have experienced multiple organ failure. Such severe or critical cases were most common among children with certain underlying conditions, such as for example, asthma (and especially more severe cases of asthma) or those with weakened immune systems. Children are associated with lower mortality rates than other age groups, when infected with COVID-19. They are more likely to experience gastrointestinal symptoms than adults. The most common symptoms among children include fever symptoms, followed by a dry cough. Other commonly reported symptoms among children include nasal congestion or runniness, fatigue, and headache. Some evidence suggests that many children who become ill develop "long COVID". Early into the pandemic, dermatologists reported an increase in chilblains-like lesions in children, especially on their feet, fingers, and toes. It has been informally referred to as "COVID toes." This was presumed related to COVID-19 infection, however confirming that a child has been infected can be difficult. Some children who become infected develop a rare condition known as MIS-C, short for "multi system inflammatory syndrome in children". This causes a persistent fever and extreme inflammation. Other symptoms associated with MIS-C include severe abdominal pain and hypotension.

#### C. THE DELTA VARIANT PART II

25. On July 27, 2021, the Center For Disease Control ("CDC")<sup>3</sup> released updated guidance on the need for urgently increasing COVID-19 vaccination coverage and a recommendation for

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<sup>3</sup>. <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>

everyone in areas of substantial or high transmission to wear a mask in public indoor places, even if they are fully vaccinated. CDC issued this new guidance due to several concerning developments and newly emerging data signals. First, a significant increase in new cases reversed what had been a steady decline since January 2021. In the days leading up to our guidance update, CDC saw a rapid and alarming rise in the COVID-19 cases and hospitalization rates around the country. In late June, the 7-day moving average of reported cases was around 12,000. On July 27, the 7-day moving average of cases reached over 60,000. This case rate looked more like the rate of cases we had seen before the vaccine was widely available. Second, new data began to emerge that the Delta Variant was more infectious and was leading to increased transmissibility when compared with other variants, even in some vaccinated individuals. This includes recently published data from CDC and our public health partners, unpublished surveillance data that will be publicly available in the coming weeks, information included in CDC's updated Science Brief on COVID-19 Vaccines and Vaccination, and ongoing outbreak investigations linked to the Delta Variant. Delta is currently the predominant variant of the virus in the United States. Below is a high-level summary of what CDC scientists have recently learned about the Delta Variant. More information will be made available when more data are published or released in other formats.

D. THE DELTA VARIANT AND CHILDREN

26. The highly contagious Delta Variant has transformed the COVID-19 pandemic, and is accounting for the overwhelming majority of new cases across the U.S. And new cases in children are up 85% in recent weeks, prompting groups like the American Academy of

Pediatrics and the Centers for Disease Control and Prevention to send a clear message: Delta is different. Hospitals in COVID-19 hot spots around the U.S. note they're running out of beds for pediatric patients. That rise in hospitalizations seems to reflect the fact that Delta is more contagious, and that children are more vulnerable because they're not yet eligible for vaccination.

27. Schools are an important part of the infrastructure of communities. They provide safe and supportive learning environments for students that support social and emotional development, provide access to critical services, and improve life outcomes. They also employ people, and enable parents, guardians, and care givers to work. Though COVID-19 outbreaks have occurred in school settings, multiple studies have shown that transmission rates within school settings, when multiple prevention strategies are in place, are typically lower than – or similar to – community transmission levels. CDC's science brief on Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs summarizes evidence on COVID-19 among children and adolescents and what is known about preventing transmission in schools and Early Care and Education programs.
28. However, with COVID-19 cases increasing nationally since mid-June 2021, driven by the B.1.617.2 (Delta) variant of SARS-CoV-2, protection against exposure remains essential in school settings. Because of the highly transmissible nature of this variant, along with the extent of mixing of vaccinated and unvaccinated people in schools, the fact that children less than 12 years of age are not currently eligible for vaccination, and low levels of vaccination among youth ages 12-17, CDC recommends universal indoor masking for all students (age 2 years and older), teachers, staff, and visitors to K-12 schools regardless of

vaccination status. Schools should work with local public health officials, consistent with applicable laws and regulations, including those related to privacy, to determine the additional prevention strategies needed in their area by monitoring levels of community transmission (i.e., low, moderate, substantial, or high) and local vaccine coverage, and use of screening testing to detect cases in K-12 schools. For example, with a low teacher, staff, or student vaccination rate, and without a screening testing program, schools might decide that they need to continue to maximize physical distancing or implement screening testing in addition to mask wearing. Schools should communicate their strategies and any changes in plans to teachers, staff, and families, and directly to older students, using accessible materials and communication channels, in a language and at a literacy level that teachers, staff, students, and families understand.

E. COVID 19 AND THE DELTA VARIANT IN TEXAS

29. The highly contagious Delta Variant is causing a rapid surge in new COVID-19 cases, hospitalizations and deaths in Texas. Jennifer Shuford, Chief State Epidemiologist at the Texas Department of State Health Services, said preliminary data show the Delta Variant currently makes up more than 75% of new COVID cases in the state. “What Texas is experiencing is similar to what’s happening across the United States,” she said. Much like other states where the Delta Variant is surging, there has been an uptick in severe illness due to COVID here. Chris Van Deusen, a spokesman for the agency, said that compared to just last week, new COVID cases are up 92% in Texas, hospitalizations are up 49% and fatalities are 15% higher. “Those are all going in the wrong direction,” he said. Shuford said COVID-19 has been rapidly spreading particularly among unvaccinated people. Because

older populations have higher vaccination rates than younger people, she said the latter are seeing the highest spikes in infections right now. “We do expect that more of these cases are going to be seen in younger individuals just because they don’t have that protection from being fully vaccinated,” Shuford said.<sup>4</sup>

30. Governor Abbott’s order was issued only days before the Centers for Disease Control (“CDC”) updated its “Guidance for COVID-19 Prevention in K-12 Schools” to recommend “universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status,” noting that “protection against exposure remains essential in school settings.”<sup>5</sup> The CDC explained that the “universal mask” recommendation was motivated by “the circulating and highly contagious Delta Variant.” Indeed, as reported by the American Academy of Pediatrics, there has been a nearly sevenfold increase in new child COVID-19 infections in the last month, with 12,000 cases reported nationwide in the first week of July and up to 96,000 in the first week of August.<sup>6</sup> As noted by one publication, “child hospitalizations have now reached an all-time pandemic high.”<sup>7</sup>
31. According to reports, medical professionals in part attribute the increase in COVID-19 pediatric infections to the latest variants in the virus and the fact that children under 12 years

<sup>4</sup>.

<https://www.kut.org/covid-19/2021-08-04/delta-variant-is-making-up-more-than-75-of-new-covid-19-cases-in-texas-health-officials-say>

<sup>5</sup>. Centers for Disease Control, *Guidance for COVID-19 Prevention in K-12 Schools*, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> (last updated Aug. 5, 2021).

<sup>6</sup>. Emily Anthes, *The Delta Variant Is Sending More Children to the Hospital. Are They Sicker, Too?*, The N.Y. Times, Aug. 9, 2021, <https://www.nytimes.com/2021/08/09/health/coronaviruschildren-delta.html>.

<sup>7</sup>. Katherine J. Wu, *Delta Is Bad News for Kids*, The Atlantic, Aug. 10, 2021, <https://www.theatlantic.com/health/archive/2021/08/delta-variant-covid-children/619712/>.

old are ineligible to receive the vaccines.<sup>6</sup> COVID-19 vaccines have been shown to be effective at helping protect against severe disease and death from variants of the virus currently circulating, including the Delta Variant.<sup>8</sup> Unfortunately, according to Dr. Murphey, only 45% of Texans are fully vaccinated. Even more alarming, Dr. Murphey notes that Texas is “among 20 states considered ‘high’ risk for the unvaccinated” given recorded COVID-19 cases and positivity test rates. *Id.* ¶7. Plaintiffs are all under the age of 12 and thus do not qualify for COVID-19 vaccination at this time. To make matters worse, according to Dr. Alexander Yudovich, a board-certified pediatrician, fellow of the American Academy of Pediatrics (“AAP”), member of the medical advisory team of a Houston private school, and former Chief Resident at Children’s Hospital Los Angeles, both COVID-19 and respiratory syncytial virus (“RSV”) are circulating throughout the country, and if a child contracts both viruses, it can lead to a “higher likelihood of respiratory failure [and] necessity for ICU care.” Dr. Yudovich further states that the combination of the Delta Variant and the unvaccinated status of children under 12 years old will mean, “schools without mitigation strategies will be an epidemiological disaster and a lesson in statistics.” The Doctor’s support the *Swiss Cheese Model* of protection, which simply put has the common sense notion that the more layers of prevention the better. Not surprisingly, Texas is a state included in the CDC’s June 2021 RSV health advisory.<sup>9</sup>

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<sup>8</sup>. Centers for Disease Control, *Key Things to Know About COVID-19 Vaccines*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html> (last updated Aug. 16, 2021).

<sup>9</sup>. See E.T., et al v. Governor Greg Abbott, et al. C.A. No. 1:21-cv-00717-LY (W.D. TX- Austin Division) “PLAINTIFFS’ EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION and evidence attached thereto.

E. COVID 19 AND THE DELTA VARIANT LOCALLY

32. As we know the Connally Independent School District in Waco announced five schools would be shut until after the death of two teachers. The Iraan School District delayed opening school for a few weeks. One child from Houston needed to get immediately to the ICU, but there were no beds. All pediatric ICUs in Houston were full so she was airlifted to the closest, 150 miles away in Temple, Texas.. The Richardson Independent School District shut down one of its elementary schools because of the virus. Reportedly one child is in intensive care.
33. Collin County reports that about a year ago there were just about 100 people in the county who were hospitalized. There were 107 in July and about 400 at the beginning of August. On September 3<sup>rd</sup> there about 543 people hospitalized.<sup>10</sup> For all practical purposes there are almost no pediatric ICU beds in the greater DFW area. Recently over 200 hundred physicians at the Cook's Children Health Care System recently sent an *Open Letter* "To The Leadership at North Texas Regional Schools, " which is applicable in Central Texas, and frankly throughout the entire. Importantly it stressed the following ten (10 points):
1. Make sure all children are up to date on the routine childhood vaccinations needed for school entry. Access to medical offices, fear of leaving home and of waiting room exposures, and closed schedules of weary medical providers taking long-awaited vacations could result in a drop in vaccination rates against measles, mumps, rubella, pertussis, and the bacteria causing meningitis. A slight drop in vaccine coverage for measles, pertussis, and mumps translates quickly to a loss of herd immunity and outbreaks of serious, vaccine-preventable illnesses.
  2. Revisit the latest masking decisions in light of the recent surge in COVID-19 cases. The American Academy of Pediatrics (AAP) and the Centers for Disease Control and Prevention (CDC) advocate for masking in schools, especially in areas

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<sup>10</sup>. <https://experience.arcgis.com/experience/c00baf45f12a4899aae1c812e29d6cde>

with moderate to high transmission of COVID19. Follow guidance from your local health department, which will be in line with the current state of the pandemic and regional community health recommendations. We have learned during the pandemic that most children, 2 years of age and older, can wear a mask.

3. Encourage COVID-19 vaccination of all eligible children and adults. COVID-19 efficiently spreads from adults and teenagers to younger children, not often the reverse. The key to keeping schools open during the COVID-19 pandemic is getting immunized parents and all eligible family members vaccinated.

4. Arrange for mobile COVID-19 vaccination units to be present during orientation and events such as 'meet-the-teacher' nights. Gains in U.S. vaccine acceptance are likely to come amidst the group of people who don't have a solid reason to avoid vaccination. Surveys reveal that most of these people were hoping that the pandemic was wrapping up and that they would not have to take a risk by taking an "untested" vaccine. They are reasonable people who describe themselves as cautious, slow adopters of things that are new. Most are not necessarily opposed to vaccination philosophically. They were just hoping to wait out the pandemic while relying on social distancing, masking, and herd immunity to keep them from having to get a vaccine. With the loosening of restrictions and the surge in cases due to the Delta Variant, many are now ready to stop holding out.

5. Continue to utilize strategies promoting social distancing in the classroom (by using partitions, separating desks, and cohorting of student groups), during passing periods (by keeping them short to discourage standing around in small groups and conversing), and during meal times (by moving meals outside in the fresh air, limiting line length for meal service, and by observing social distancing).

6. Re-enforce good hand-hygiene practices and cleaning of shared workstation areas with demonstrations that highlight effective hand hygiene and disinfection techniques.

7. Quarantine unvaccinated children and school staff members exposed to COVID-19 per CDC guidance. Vaccinated exposed persons may still get sick with COVID-19 and could be contagious, though their risk of hospitalization and severe disease is extremely low. Quarantine exposed, vaccinated persons if they develop symptoms of COVID-19 until testing results are available.

8. Provide interactive and technologically sound, distance-learning alternatives for immunocompromised students who should not be in the classroom during the pandemic.

9. Encourage precautions for bus riders like masking and opening windows to promote adequate ventilation and reduce the transmission of COVID-19 while

traveling to and from school.

10. Above all, send recurring reminders to parents not to send ill children to daycare and to school. Many parents are returning to the workplace for the first time in over a year. They may be experiencing pressures to be physically present, rather than staying home with an ill child. Memories are short when pressures are high. However, we are still in the midst of a global COVID-19 pandemic that has already claimed the lives of more than 600,000 people in the U.S.”

## **XII. FACTUAL RESUME**

A. **LAGO VISTA ISD**

34. Lago Vista ISD is located in Travis County on the north shore of Lake Travis and is part of the greater Austin metropolitan area. The District encompasses 35 square miles and serves the cities of Lago Vista, Point Venture, and South Jonestown Hills. The District has a total student enrollment of 1,620 students as of the 2019/2020 school year. Lago Vista has one Elementary School (Early Childhood Special Education and Grades K-3rd), one Intermediate School (Grades 4<sup>th</sup> & 5<sup>th</sup>), one Middle School (Grades 6th-8th) and one High School (Grades 9th-12th).
35. Jane Doe Lago Vista is one of three children under the age of 12 who have attended Lago Vista ISD schools. One sibling is in fourth grade, another in third grade and one in Kindergarten. All are ineligible to receive the COVID-19 vaccine due to their ages. The parents of Jane Doe and her siblings were deeply disappointed to learn that the Lago Vista ISD Board of Trustees had voted to keep masks optional for the 2021/22 school year. Once school started, it became clear there were effectively no meaningful measures in place to

mitigate the spread of COVID-19. Jane Doe I expressed deep anxiety over starting the school year, well beyond the normal beginning-of-school nerves. She had difficulty sleeping, and she repeatedly begged me to home school her. Jane Doe I needs to be in a structured learning environment in order to succeed in school. Home schooling is not an option for the family and are frustrated that the people providing her much-needed education support are not taking steps to protect vulnerable children who are too young to be vaccinated. The parents have shed many tears over the dangerous health situation at the Lago Vista ISD. They ask the Court to compel their School District to adopt a *Mask Mandate* and follow CDC, American Academy of Pediatrics, and Austin Public Health guidelines, Cook Children's Health Center guidelines for COVID mitigation.

B. FRISCO ISD

36. Frisco ISD is located about 30 miles north of Dallas, Texas, and encompasses 75 square miles in Collin and Denton counties, including most of the City of Frisco and portions of neighboring Plano, McKinney and Little Elm. It currently enrolls more than 65,000 students in 11 high schools, 17 middle schools, 42 elementary schools and 3 special programs schools. As of 2021, the adopted tax rate for Frisco ISD is \$1.2672 with a total Expenditure budget of \$651,299,710 and a Revenue budget of \$655,072,200.
37. Since the COVID-19 epidemic began, Jane Doe Frisco's mother is extremely concerned about her child contracting COVID-19, especially since he is immune compromised. It takes her a very long time to recover from illnesses on top of the other conditions she already suffers from. Mother makes her sons wear masks to school every day. They understand the effects of either of them getting the COVID-19 would be on their sister. The problem is that

this School District does not require masks. In addition, mother reports there are no safe social distance between students rules in place, nor any upgraded MERV 13 air filters, nor either any systemic or portable system to accommodate high density population situations such as lunch, Physical Education, band halls, work-out rooms, assemblies, locker rooms, auditoriums, pep rallies, sporting events, libraries and any other high-risk COVID-19 spreading opportunities. During lunch everyday, kids are piled into the cafeteria, elbow to elbow eating lunch. Mother reports she is deeply concerned about the safety of Jane Doe Frisco and other family members. They live in fear every single day watching their kids walk into school.

C. GRAPEVINE-COLLEYVILLE

38. Grapevine-Colleyville Independent School District is a public school district based in Grapevine, Texas. The district serves most of the cities of Grapevine and Colleyville and includes small portions of Euless, Hurst, and Southlake. Grapevine-Colleyville ISD is a school district in Grapevine, TX. As of the 2019-2020 school year, it had 14,171 students in 11 Elementary Schools, 4 Middle Schools and 3 High Schools, 2 alternative schools and 1 Virtual Education school catering to grades 5-12.
39. This School District reportedly has none or very few of the COVID-19 safety protocols in places that they had in place last school year, when they had a COVID-19 positive rate of only 9%. Today the positivity rate in Tarrant County is 20.56%. Importantly, the Grapevine-Colleyville ISD is no longer requiring close contacts of infected students to quarantine at home. Infected students are also not being required to produce a negative COVID-19 test result in order to return to school. The District has held numerous pep rallies

since school started August 18, 2021, all taking place during instructional time in enclosed areas with hundreds of unmasked students. In such scenarios, contact tracing is impossible. They held a Homecoming Dance inside of the high school gym with 1200 unmasked, socially-un-distanced students on September 14<sup>th</sup> which proved to be a super-spreader event. Beginning the week after this dance was held, Colleyville Heritage High School has had the worst COID-19 numbers of any school in the district, with 3 times the number of cases as the school with the next highest COVID-19 case count in the district.

40. Jane Doe Grapevine- Colleyville sat in a classroom with broken air conditioning and stagnant, non-moving air for 2 hours each day in her Physics Class the first week of school. At the time there was reportedly a high 22% COVID-19 positivity rate in Tarrant County. Jane Doe Grapevine- Colleyville continues to be at risk because this classroom and other risky situations to (a) exposure to COVID-19, (b) contracting COVID-19, (c) becoming sickened by COVID-19, (d) sustaining short term and/or long term harms from COVID-19 illness, (e) missing valuable instruction time due to illness and (f) transmitting COVID-19 to her parents who are both high-risk with underlying medical conditions and her grandmother who is high-risk with underlying medical conditions. The family asks the Court to issue a Mask Mandate and to take other reasonable precautions.

D. HURST-EULESS-BEDFORD

41. Hurst-Euless-Bedford Independent (“HEB”) School District is a K-12 public school district based in Bedford, Texas. The district serves the city of Bedford, most of the cities of Euless and Hurst, and small parts of North Richland Hills, Colleyville, Fort Worth, and Arlington. As of September 2020, HEBISD had a tax rate of \$1.198 with an operating budget of \$213

Million with a student enrollment of 23,707 students in 21 Elementary Schools, 5 Junior High Schools and High Schools.

42. John Doe HEB is a student with respiratory/asthma issues where he has to use an inhaler. He is under the age of 12 and ineligible to receive the vaccine. If exposed to other students, teachers and staff that could be carrying the COVID-19 virus it could be potentially life threatening for him. The District's failure to have a Mask *Mandate* also impacts John's three other siblings that attend HEB ISD schools. While they do not have asthma, they are also being exposed and because they all live in the same household and they could potentially expose their brother, who has significant respiratory issues.
43. The HEB ISD announced on March 13<sup>th</sup> 2020, the cancellations of all in-person classes to help stop the spread of SARS-Cov-2 (COVID-19). Following the initial cancellation through March 20<sup>th</sup>, 2020, the HEB ISD proceeded with cancellation of all in-person classes through the end of the 2020-2021 school year. As outlined in its Return-to-Learn plan for the 2021-2022 school year, HEB ISD failed to institute a mask requirement policy on any, and all campuses and facilities for students, staff, and visitors.
44. The number of weekly admissions of patients requiring pediatric care as of August 25<sup>th</sup>, 2021 at the local county children's medical center(s) [Cooks Children's Hospital Network] and in TSA-E reached the highest level recorded since the first known identification of SARS-Cov-2. The HEB ISD had been made aware, and is aware, of the aforementioned circumstances within our local and regional medical system, Texas Trauma Service Area E (TSA-E) which encompasses 19 counties, including Tarrant County. On or about August 25<sup>th</sup>, 2021 HEB ISD announced, due to the intervention and recommendation of the Tarrant

County Public Health Department, all students and their siblings who attended Meadow Creek Elementary in the #rd Grade would learn online beginning Friday, August 26<sup>th</sup>, 2021 through Friday, September 3<sup>rd</sup>, 2021 citing the spread of SARS-Cov-2, and the need to mitigate the transmission of the Delta Variant of SARS-Cov-2. On August 27<sup>th</sup>, 2021, during a Called Meeting of the HEB ISD Board of Trustees, had been made aware, and are aware, of public statement(s) from licensed medical professionals in good standing with the State of Texas Medical Board, affirming zero (0) to less than (5) percent of staffed pediatric intensive care unit beds were available. On August 27<sup>th</sup>, 2021, during a Called Meeting of the HEB ISD Board of Trustees, they denied a motion to implement a temporary mask mandate. HEB ISD has failed to implement adequate social-distancing and mitigation protocols as recommended the United States Center for Disease Control, which have resulted in an increased in positive known cases of SARS-Cov-2; This continues in the present day.

45. Jane Doe HEB is a Elementary student that would have attended Viridian Elementary School as a Kindergartner. Her parents are also concerned due to the ISD's lack of a *mask mandate* and other COVID-19 protocols. Her father is immunocomprised and her grandparents who are consistent caretakers are over the age of 65. Jane DOE HEB's mother works with vulnerable population in the Oncology department. Based upon such uncertainty her parents withdrew Jane before the school year began. Initially a virtual option was presented and she was signed up. The Board ultimately rejected the virtual option. She is not getting any services from the School District.

### **XIII. INJURIES EXPERIENCED BY THE DOE's and the PROPOSED CLASS**

46. The DOE's and members of the PROPOSED CLASS have gotten the Delta Variant.
47. The DOE's and the PROPOSED CLASS are frightened they will get the Delta Variant again.
48. The DOE's and the PROPOSED CLASS are frightened they will communicate the Delta Variant to a loved one, fellow student, teacher or neighbor.
49. The DOE's and the PROPOSED CLASS are frightened because they do not know what the long term effects of the Delta Variant.
50. The DOE's and the PROPOSED CLASS are upset because if their parents keep them home from school during this time of uncertainty they will miss valuable educational time.
51. The DOE's and the PROPOSED CLASS are frightened because if their parents keep them home from school during this time of uncertainty they will be marked absent from school, be declared truant and have to go to Court.
52. The DOE's and the PROPOSED CLASS are frightened because if their parents keep them home from school during this time of uncertainty they will be discharged from specialty classes and programs.
53. The DOE's and the PROPOSED CLASS are frightened because when they wear masks at school and others do not, they are treated as objects of derision by other members of the school community because of the District's punitive responses noted above.
54. This list is merely illustrative and not a complete list of all damages experienced.

#### **XIV. CLASS REQUIREMENTS**

55. Plaintiffs incorporate by reference all the above-related paragraphs with the same force and effect as if herein set forth. In addition, each sentence and paragraph below, likewise incorporates by reference as if fully set forth herein, the one above it.

56. Pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(1), 23(b)(2), and 23(b)(3), the DOE's, named Plaintiffs herein, bring forth this class action on behalf of themselves and the members of the PROPOSED CLASS.
57. The exact number of the PROPOSED CLASS is not presently known, but the PROPOSED CLASS consists of all children who are in an elementary school at the Defendants Independent School District and have a sibling at a middle school, highschool or other campus within the Defendants Independent School District family
58. Plaintiffs reasonably believe the PROPOSED CLASS is believed to consist of approximately 400 students in the elementary schools, with a like number in the high school, and more or less- a like number in the middle schools, freshman campus and specialty schools and joinder of all of such members in this lawsuit is impracticable.
59. There are common questions of law and fact in the action that relate to and affect the rights of each member of the PROPOSED CLASS that will generate common answers that will drive resolution of this action. Further, the relief sought is common to the DOE's and the entire PROPOSED CLASS as all are victims of the School Board's Defendants' unconstitutional conduct. Accordingly, pursuant to Federal Rules of Civil Procedure 23(a)(2), there are questions of law and fact common to the DOE's and the PROPOSED CLASS.
60. The DOE's, named Plaintiffs herein, have claims are typical of the Class they represent pursuant to Federal Rules of Civil Procedure 23(a)(3) because the School Board Defendants violated their rights pursuant to the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution. There is no conflict between the DOE's and any other PROPOSED

CLASS members with respect to this action.

61. The DOE's, named Plaintiffs herein, have claims are typical of the Class they represent pursuant to Federal Rules of Civil Procedure 23(a)(3) because the School Board Defendants violated their rights pursuant to the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States Constitution. There is no conflict between the DOE's and any other PROPOSED CLASS members with respect to this action.
62. The DOE's, named Plaintiffs herein are adequate representatives of the PROPOSED CLASS pursuant to Federal Rules of Civil Procedure 23(a)(4). The interests of the DOE'S do not conflict with the interests of the PROPOSED CLASS that they seek to represent, and the DOE's will fairly and adequately represent the PROPOSED CLASS. Moreover, they intend to prosecute this action vigorously. Therefore, the DOE's, named Plaintiffs herein, should be appointed as representatives of the PROPOSED CLASS.
63. This action is properly maintainable as a class action pursuant to Federal Rules of Civil Procedures 23(b)(a)(A) or 23(b)(1)(B) because the prosecution of separate actions by individual members of the PROPOSED CLASS would create a risk of inconsistent or varying adjudications with respect to individual members of the PROPOSED CLASS that, as a practical matter, would be dispositive of the interests of other PROPOSED CLASS members not party to the adjudication, or would substantially impair or impede the ability of other PROPOSED CLASS members to protect their interests, or would establish incompatible standards of conduct and results for Defendants.
64. This action is properly maintainable as a class action under Federal Rules of Civil Procedure 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable

to the PROPOSED CLASS, thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the PROPOSED CLASS as a whole.

65. This action is properly maintainable as a class action under Federal Rules of Civil Procedure 23(b)(3) because questions of law and fact common to the PROPOSED CLASS predominate over individual questions for the members of the PROPOSED CLASS, and a class action is superior to other available methods for the fair and efficient adjudication of this case.
66. There are numerous questions of law and fact common to the PROPOSED CLASS including, though not limited to, the following:
  - a. Whether the Defendants Independent School Board receives federal funds;
  - b. Whether the Defendants Independent School Board is required to follow the United States Constitution;
  - c. Whether the Defendants Independent School Board is a subdivision of the State of Texas;
  - d. Whether the members of the PROPOSED CLASS receive educational services from the Defendants Independent School District;
  - e. Whether the members of the PROPOSED CLASS are unable to represent themselves;
  - f. Whether the Defendants Independent School Board has failed to follow the requisites of the 14<sup>th</sup> Amendment to the United States Constitution;
  - g. Whether members of the PROPOSED CLASS have been excluded from participation in or being denied the benefits of the services, programs, or activities otherwise provided by the School Board of the Defendants Independent School District.

67. The DOE'S, named Plaintiffs herein have retained counsel for themselves and the PROPOSED CLASS that are experienced and capable in their field and have been recognized as knowledgeable, capable counsel who have carried out their duties.

#### **XV. STATE ACTION**

68. At all relevant and material times the Defendants School District was acting in its capacity as a duly organized executive agency pursuant to the Constitution of Texas, and the statutes and regulations promulgated by the State of Texas. As such, it is subdivision of government and has a duty to follow the requisites of the United States Constitution at all relevant and material times. In light of all the above, the School District Defendant was acting under the color of law when the acts and/or omissions alleged occurred.

#### **XVI. VIOLATIONS OF THE UNITED STATES CONSTITUTION**

##### **A. DUE PROCESS**

69. During the relevant time period contemplated by this cause of action, the Defendants Independent School District by and through its School Board Members have an actual practice and custom of conscious and deliberate indifference to the right to life of the DOE's and members of the PROPOSED CLASS, underscored in the Due Process Clause of the 14<sup>th</sup> Amendment to the United States, and such deliberate indifference to the constitutional rights of Plaintiffs, were and continue to be a moving force in the injuries stated herein, to which the Plaintiffs and each member of the PROPOSED CLASS for which all seek equitable relief pursuant to 42 U.S.C. §1983.

##### **B. EQUAL PROTECTION**

70. In addition and in the alternative to the above, during the relevant time period contemplated

by this cause of action, the Defendants Independent School District by and through its School Board Members have an actual practice and custom of conscious and deliberate indifference to the right to life of the DOE's and the members of the PROPOSED CLASS, underscored in the Equal Protection Clause of the 14<sup>th</sup> Amendment to the United States, and such deliberate indifference to the constitutional rights of Plaintiffs, were and continue to be a moving force in the injuries stated herein, to which the Plaintiffs and each member of the PROPOSED CLASS for which all seek equitable relief pursuant to 42 U.S.C. §1983.

**XVII. REQUEST FOR RELIEF**

71. Without the intervention of this Court, the DOE's and the PROPOSED CLASS, Plaintiffs herein cannot prevent the Defendants School Board from continuing their violations of the due process clause of the 14<sup>th</sup> Amendment to the United States Constitution, relative to life and health of students, faculty, family and other members of the school community. In “plain English” until vaccines are made available to children under twelve (12) years old Plaintiffs and members of the PROPOSED CLASS face an imminent threat of harmful and potentially life-altering and life-threatening consequences if exposed to an environment bereft of universal masking required at the Defendants Independent School District. Though parents of all children have cause for concern, those with children who have disabilities that compromise immune responses or impair respiratory or neurological function have heightened reasons to be anxious about returning to school without a mask mandate in place. According to the CDC, “children with medical complexity, with genetic, neurologic, metabolic conditions, or with congenital heart disease can be at increased risk for severe

illness from COVID-19.”<sup>11</sup>

72. Without the intervention of this Court, the DOE’s and the PROPOSED CLASS, Plaintiffs herein cannot prevent the School Board Defendants from continuing their violations of the equal protection of the law of the 14<sup>th</sup> Amendment to the United States Constitution, relative to life and health of students, faculty, family and other members of the school community. Accordingly, the DOE’s and the PROPOSED CLASS, Plaintiffs herein respectfully pray that the Court enter an order granting the following relief:
73. An order directing the Defendants School Board Independent School District to immediately follow the standards and practices for the health care of students in public school as provided by the United States Department of Health and Human Services, Center for Disease Control, and as updated and alternatively directives, from the Cook Children’s Health System.
74. An order requiring the Defendants to send out a message to all persons and families in the School District catchment area notice of this lawsuit including and especially the importance of the anti-retaliation requisites of Board Policy and the First Amendment to the United States Constitution.
75. An order requiring the Defendants to send out a message to all persons and families in the School Districts catchment area notice of and the Court’s mandate.
76. DOE’s and the PROPOSED CLASS, Plaintiffs herein also pray that the Court issue a permanent injunction against the Defendants.
77. DOE’s and the PROPOSED CLASS, Plaintiffs herein request that the court appoint a

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<sup>11</sup>. Centers for Disease Control, *COVID-19: People with Certain Medical Conditions*, May 13, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medicalconditions.html>

Special Master to ensure that required changes are reviewed, approved, and implemented.

78. DOE's and the PROPOSED CLASS, Plaintiffs herein request that the court appoint a Federal Judge Magistrate to offer alternative dispute resolution services in lieu of costly, time-consuming and vexatious litigation.

**XVIII. DEMAND FOR A JURY TRIAL**

79. Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a jury trial for all issues in this matter.

**PRAYER**

**WHEREFORE, PREMISES CONSIDERED**, DOE's and the PROPOSED CLASS, Plaintiffs herein, pray in the manner and particulars noted above, including and especially as to the equitable relief requested; of attorney's fees and costs for the preparation and trial of this cause of action, and for its appeal if required, together with pre- and post-judgment interest for same, and for such other relief as this Court may deem just and proper, whether at law or at equity or as to both.

Respectfully submitted,

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